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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 71.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Co., Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

REPLY BRIEF.

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IN THE

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J. J. MOORE & Co.,
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vs.
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APPEAL FROM THE COURT OF CLAIMS.

Reply Brief.

I.

The brief for the United States begins with a "Statement" which is really a mingling of fact, law, and argument instead of a mere statement of facts as found by the Court below. As all of the arguments suggested in that "Statement" are developed in the other branch of that brief, we will content ourselves with discussing them in that connection.

II.

Under the head of "Argument" counsel for the government has advanced certain propositions for discussion.

1. Some question is made of the application here of the rules of law relating to custom. We have shown on pages 7 to 16 of our original brief that the custom prevailing at the port of San Francisco must be considered as if it had been read or written into the body of the contract though it be unknown to one of the contracting parties. Such custom is as binding on all parties to the contract as is the law of the land. The writing, the law and the established custom make up the contract.

It is no answer to say that these rules operate to "enlarge the contract." Established custom no more enlarges the contract than does the law of the land.

2. On page 8 of the brief for the government it is argued that, if custom is to be called into service for the purpose of interpreting or explaining the contracts sued on, the custom of the port of Honolulu, so far as it relates to discharge of cargoes, must regulate and determine the contracts.

Custom is not called into service to *interpret* or *explain* the contracts but to show what is embodied in them in legal contemplation. The custom of the port of San Francisco, as set out in Finding III, Rec. page 11, required consignee to direct what berths or places should be used for the discharge of cargoes, the discharge to commence when ships were ready and notice thereof given by the captains in writing, etc. That custom must be treated as if written into the contracts with the United States. It dealt with the conduct of the ships and the consignee at Honolulu, the port of discharge, and covered the situation completely. The custom of the port of Honolulu concerning the discharge of the cargoes had nothing at all to do with these contracts or with the manner of delivering the cargoes under the contracts. Had

there been nothing at all in the contracts, or had there been no established custom on these subjects in the port of San Francisco embodied in the contracts by operation of law, the custom of the port of Honolulu might well have been an essential factor in this business.

But as the custom of the port of San Francisco must be treated as written into the body of the contracts, there is no occasion here to consider what the law would be if the case were covered by a custom of the port of Honolulu. We must deal with the case as it is.

3. On pages 9 to 13, counsel for the government has argued that the government has a complete defence because the harbor master at Honolulu had charge of the harbor and assigned ships to berths at the wharves in the order of their respective arrivals.

On pages 16 to 42 of our original brief, we have shown that the appellant was not in any sense responsible for the conditions existing in Honolulu. The government should have arranged to take the coal elsewhere than at the wharves if the congestion was so great as to cause delay. Counsel for the government seems to overlook the fact that the government had contracted to take these cargoes at certain dates or periods of time. Indeed, he seems to ignore essential features of the contracts, as well as Finding III, relating to the custom of the port of San Francisco, which is to be treated as written into the contract and as regulating the business in the port of Honolulu and fixing the rights of all parties. No regulations or laws in force at Honolulu could destroy the binding force of the contracts. Finding III can no more be obliterated from the case than can the contracts copied in Finding II. Whatever there may have been in the

way of regulation or custom in the port of Honolulu, not in harmony with the contracts and the custom set forth in Findings II and III, must be held as nought and in no sense binding upon either of the parties to this case.

4. Counsel for government, on pages 14 to 19, discusses the question as to the time when the "lay days" began to run.

We have considered that question on pages 50 to 52 of our original brief. According to facts set forth in Findings III and IV, there cannot be any doubt about the rules of law applicable to them. The custom at the port of San Francisco is clear and definite. The dates of the arrival of the ships at Honolulu are fixed, and the Court finds "that in the case of each ship the defendant had notice in writing of their respective arrivals within twenty-four hours thereafter." In view of all this, we do not deem it necessary to consider the authorities cited by counsel further than to say that they are all predicated upon other contracts and conditions and are not applicable to this case.

III.

On page 21 and to the end of his brief, counsel for the United States discusses the liability of the government for refusing to receive the 366 tons of coal. On page 23 it is said: "The appellant did not charter another vessel to carry the 366 tons, but purchased the same from a vessel lying in harbor at the dort of Honolulu. Was he aware at the time he made the purchase that the United States considered the contract closed? Had the United States at the time he made such purchase actually refused the coal? As to these pertinent points the findings are silent."

We state professionally that not one word of evidence on those subjects appeared in the record in the Court below, nor did the government make any attempt, in cross-examining the claimant and his witnesses, to elicit such evidence. We think it safe to assume that the claimant would not have been foolish enough to go to all that trouble and hazard if he had been aware that the government considered the contract completed or closed. We have no doubt at all that, if such had have been the fact, the government would have proven it by some of its witnesses or by cross-examining the claimant's witnesses, or by producing official documents. The total absence of such evidence and findings destroys the argument made by counsel for appellee.

We think it perfectly clear, if the government had actually refused before that time to receive that coal from the claimant, he would not have bought and tendered it, nor would the government have allowed the fact to go unproven. We may depend upon it that had these facts been proven, the Court below would have found them, or the counsel for the government would have taken the steps necessary to have the finding made perfect.

It is sufficient to say now that the claimant was obliged by his contracts to furnish certain quantities of coal, and that he tendered the remainder of that quantity, or 366 tons, "but the defendant refused to receive it," to use the language of Finding V.

The subject is discussed fully on pages 53 to 60 of our original brief.

V.

The claimant did what his contract required him to do; no more, no less. For having done that much,

he is criticised by counsel for having tendered the full amount of coal agreed upon and making a profit thereon. Patriotism and loss of profits are not synonymous terms. Performance of contracts may be said generally to be in harmony with love of country.

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